IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 53

ALVIN R. CAMPBELL, ARNOLD S. CAMPBELL, and DONALD LESTER,

Petitioners,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONERS

LAWRENCE F. O'DONNELL
One State Street
Boston, Massachusetts

MELVIN S. LOUISON
LEONARD LOUISON
8 Taunton Green
Taunton, Massachusetts

Counsel for Petitioners

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Opinion Below

The opinion of the Court of Appeals (R. 216-222) is reported at 269 F. 2d 435.

Jurisdiction

The judgments of the Court of Appeals were entered on August 27, 1959 (R. 223). Petition for rehearing was denied on September 15, 1959 (R. 223). The time for filing a writ of certiorari was extended to and including October 22, 1959, by order of Mr. Justice Frankfurter, dated October 12, 1959 (R. 224). The petition for a writ of certiorari was filed on October 22, 1959, and was granted on March 7, 1960 (R. 225), 362 U.S. 909. The jurisdiction of this Court rests on 28 U.S.C. Sec. 1254(1).

Question Presented

Whether production of a statement which was read and signed by a government witness is excused after a complete foundation for it is made under 18 U.S.C. 3500 on the ground that the only document in the possession of the prosecutor is a summary by an F.B.I. agent and not the statement signed by the witness without any showing as to what became of the original statement.

Statute Involved

The statute involved in this case is the so-called Jencks case Statute, 18 U.S.C., Section 3500. This statute is printed in its entirety in the Appendix, *infra*.

Statement

The petitioners were charged jointly in a seven count indictment with violations of the Bank Robbery Act, 18 U.S.C. 2113, Sections (a), (b) and (d). They were convicted by a jury and each was sentenced to various terms on each Count ranging up to twenty-five years, all to be served concurrently.

There are set forth here only sufficient relevant facts for a review of the particular question presented in the grant of the writ of certiorari.

One Dominic Staula was called as a government witness (R. 138)[1] and testified at some length to details of the robbery, identifications, and interviews with special agents of the F.B.I.

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[1] Page references are to those appearing at the bottom of each page of the Transcript of the Record in consecutive order.

The witness Staula was the only one out of more than fifty government witnesses who identified the petitioner, Donald Lester, except for one informer-accomplice witness, a Richard Gibson. Richard Gibson was himself a suspect at one point during the investigation of the robbery by the F.B.I. and told a story in Court that he had received some money out of the proceeds of the robbery. Staula stated that Lester "looks like" the man that had the gun on him (R. 145). The trial judge later perfected the identification into a positive one (R. 146). This was followed by a reiteration of the positive identification under further questioning by the United States Attorney (R. 146-147).

Mr. Staula described a man near the door of the bank as wearing a blue suit, soft hat, and dark glasses (R. 142-143) and identified that man as resembling the petitioner, Arnold Campbell (R. 145, 171). Every other of the many witnesses who identified the man in the blue suit testified that that man either was or resembled or looked like Alvin Campbell, and that is how the witness, Yates, testified (R. 104 and 109).

Mr. Staula stated in Court that he got a glimpse of a third man, other than customers and employees, in the bank that morning (R. 143).

During the cross-examination of Staula, he was questioned about his interviews with F.B.I. agents. He was asked if an F.B.I. agent wrote down what he said; if what was written down was read back to him; and if what was written down was essentially what he had just related to them. He answered all three questions in the affirmative (R. 199-200). Counsel then demanded Staula's statement under the provisions of the Jencks Statute, 18 U.S.C. 3500, and the Court ordered the government to produce it (R. 200).

Under questioning by the Court (R. 200), Staula said that what was read back to him was an accurate statement

of what he told them. He thought he had to sign it (R. 201). At that point, it was announced that the government had no statement in its possession fitting the description of having been read, adopted and signed by Staula (R. 201-202). The Court asked if the *"United States"* has in its possession notes taken by an F.B.I. agent when Staula was interviewed (R. 203) and the U.S. Attorney stated, "I do not have them in *my* possession and I do not know whether they ever existed." (Emphasis added.)

Staula was called back to the stand on another day and shown the report of the F.B.I. agent (R. 205). The court then asked if that statement contained a substantially verbatim account of what he told the agent, and the witness said it was not (R. 205-206). The Court then excluded it and counsel then made a common law demand for that statement (R. 206). Then, counsel moved to strike the entire testimony of Staula for the failure of the government to produce the original document, which motion was denied by the court (R. 206-207). Counsel also noted that the "record is completely without explanation as to the original document" (R. 210). The United States Attorney stated that apparently counsel were "shifting position into a sphere which I was trying to get them to determine this morning what specific document they wanted. Now they say the original document is not explained" (R. 210). The F.B.I. agent's report of the Staula statement appears on R. 212-213.

During the earlier testimony of one Francis L. Yates, a similar situation arose over the statement taken from Mr. Yates by the F.B.I. The Court interrogated Mr. Yates (R. 44) and then ordered the statement produced (R. 45). The court then allowed the witness overnight to think over what happened (R. 48-50). Yates resumed the next day and was questioned by the court again and after much

colloquy (R. 58-68), the court *asked* the United States Attorney to turn over the statement (R. 68). The United States Attorney set forth his position concerning the difference between original notes and the reports of F.B.I. agents as follows (R. 65): "If a specific document is asked for and I don't have it and nobody has it, I don't think you or anybody else can require me to produce a nonexisting document." The court answered, "That's right." Finally, the judge told the jury he was giving counsel the right to have access to the F.B.I. report (R. 75).

Prior to the judge ordering the Yates statement produced, the United States Attorney claimed it did not come within the statute because he was "ruling on something (the mimeographed F.B.I. report) • • • the witness has never seen." The United States Attorney was attempting to distinguish to the Court between the handwritten notes of the F.B.I. agent and the mimeographed report or summary prepared by the F.B.I. agent which he had in his possession in the courtroom (R. 71-72).[2]

In many respects, it may be seen that the situations presented by the Yates statement and the Staula statement were similar except as to the court's decisions on each.

The court below affirmed this ruling by the district judge, stating that this point "does not warrant extended discussion" in view of *Palermo* v. *United States*, 360 U.S. 343 (R. 216-217). The Court of Appeals took the position that since the F.B.I. investigator's summary which was shown to the court *in camera* did not meet the precise definition of a statement within any of the subsections of 18 U.S.C.

[2] The court then said he felt that from an evidential viewpoint, as distinguished from any question of law, it would do a great disservice to the jury not to let them know what was in the statement. His experience had proven to him that the F.B.I. reports would not contain any exaggeration:

3500, then there was no error in refusing to order the government to produce it.

Summary of Argument

The rulings of the trial judge and the court below are based exclusively on the question of whether or not the summary produced by the prosecutor met the definition of a "statement" as set forth in the statute and explained in *Palermo*.[4] This ignores the fact that the witness Staula testified to a complete foundation for the production of his statement to the F.B.I., which the prosecutor said he did not have in his possession. Even though the summary produced did not meet the statutory definition of a statement, the failure to produce the original notes (which did satisfy the statute cannot be without consequence. The trial judge denied a defense motion to strike Staula's testimony from the record for the failure to produce the original notes. The defense was then denied access to the summary under a common law demand, which would have brought it under the law of the *Jencks*[3] case itself.

Since the Act's major concern is to limit and to regulate defense access to government papers and not to eliminate all such access, the decision of the court below could effectively contravene that purpose by ending all discovery. The decision was not only a misinterpretation of *Palermo;* it was primarily a misapplication of it. In every investigative situation, a government agent could return to his office, prepare a summary of the statement of a government witness, and then destroy the statement itself or the sub-

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[3] *Jencks* v. *United States*, 353 U.S. 657.

[4] See *The Jencks Legislation: Problems in Prospect*, 67 *Yale L.J.* 674, 688 (1958); also see *Palermo* v. *United States*, 360 U.S. 343, 362-363.

stantially verbatim notes adopted or signed by the witness. Good faith or bad faith in the destruction of the statement or notes is completely immaterial. The so-called Jencks Act cannot be used as an instrumentality to end all discovery. This would violate the legislative intent in enacting the statute as well as the Sixth Amendment. It should also be borne in mind that due process requirements demand a defendant receive a fair trial.

The mandate of Subsection (d) of the Act leaves the court with no discretion if the government elects not to comply with an order to produce, and just as clearly, the court must order that the government produce a statement when a complete foundation for it is made under the statute. Of course, the court can delete immaterial portions, etc., but it cannot refuse to order production of the statement, deny a motion to strike, and refuse then to order an agent's summary produced. Neither the government nor the trial judge can force a defendant to pick which particular document he will demand. He is entitled to any and all statements meeting statutory requirements.

The doctrine of harmless error cannot apply to this case since the original statement was never produced, was not preserved for the record, and therefore cannot be reviewed by this Court.[5] As to the summary which was preserved and reproduced (R. 212), the defense never had access to it during the trial nor to any of the information contained in it, as was the situation in *Rosenberg*.

To allow the decision of the court below to stand would be tantamount to ending all discovery of such statements and would bring about shockingly unfair consequences. Such a result is undesirable, unfair and patently improper.

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[5] See *Holmes* v. *United States*, 271 F. 2d 635, 638; *Rosenberg* v. *United States*, 360 U.S. 367, 371, 375-376.

ARGUMENT

I.

The Failure of the Government to Produce Staula's Statement After a Complete Foundation Had Been Laid—

During the cross-examination of the witness, Staula, he admitted giving a statement to an F.B.I. agent which was written down and read back to him in substantially the same language he used. He thought he had to sign the statement. The defense then demanded production of the statement under 18 U.S.C. 3500. The court at first ordered it produced (R. 200). The government prosecutors then informed the court that they did not have such statement or notes in their possession and did not know "if they ever existed" (R. 201-202, 203). Then, without cancelling or withdrawing the order to produce (meaning the statement taken at the time of the interview), the court denied the defense access to the summary of the statement and denied a motion to strike Staula's testimony for failure to produce the original notes. The court left his original order to produce in a state of suspended animation. The reasons for this are quite obvious. He was uncertain because first, a complete foundation was laid for the production of the statement, and it cannot be denied, from the testimony of the witness, that the statement once existed and once was in the possession of the United States. Subsection (b) of the statute says that after a witness called by the Government testifies on direct examination, the court, on motion of the defendant, *shall order* the production of any statement as defined by the Act with certain exceptions not here material. Second, the prosecutor then said he did not have the statutory statement in his possession and that what he did have did not meet statutory requirements.

The point that apparently confused the trial judge and which was totally ignored by the Court of Appeals was as to the meaning of the phrase "in the possession of the United States" as used in Subsection (b) of the statute. The prosecutor apparently tried to take the position that it means in the possession of the United States at the time of the demand after the witness has testified on direct examination. This interpretation is, of course, absurd, because it would only serve to render the statute useless. The prosecutor stated, and was quoted in the Government's Brief in opposition to the granting of this writ, that he was trying to get them to determine "what specific document they wanted" (R. 210). If that were permitted and the defense demands the original notes, the government says it does not have them in its possession; if the defense asks for the summary, the government answers that the summary does not come within the statute. The Statute gives neither the court nor the government any right whatsoever to force the defendant to play a game of Russian roulette with the government files and make a guess as to what particular statement or document he wants. In the case at bar, the statement which had to be produced was the one coming within the definition of the statute and proven to have existed and to have been in the possession of the government by the cross-examination of Mr. Staula.

The only way that phrase can be interpreted in order to carry out the legislative intent is to hold that it means in the possession of the United States at any time. Clearly, there is a presumption against the enactment of a useless statute, and the so-called Jencks statute would be useless if upon a demand for production, the government could be allowed to state that it does not have in its possession *at that time* any statement, notes, or document which would satisfy the statutory requirements for production.

The approach taken by the Court of Appeals to this problem was to take the naked principle of *Palermo* out of context and apply it in its entirety to a completely different factual situation. This leads to a procedure for the ending of all such discovery since this Court stated in *Palermo* that the statutory procedures are exclusive. By disposing of the original notes or statements which come within the statute in some manner or other and for any reason whatever,[6] the Government could avoid all future discovery and still not run the risk of losing that witness' testimony through a defense motion to strike. Such a procedure was not intended by the Congress and cannot be read into the *Palermo* decision. The facts of the *Palermo* case are clearly distinguishable from the facts of the instant cases. Such an unintended, undesirable and unwanted result is abhorrent to all principles of fair play in the administration of criminal justice.

As to the statement itself, it is impossible to know what was contained in it nor what impeachment material it contained since neither the defense, the trial judge, the Court of Appeals, nor this Court has ever seen it.[7] However, from the inferences to be drawn from the agent's summary of Staula's statement (R. 212), there must have been tremendous impeachment material in his statement. In the F.B.I. summary, it is stated that Staula could not identify the man in chino pants although he positively identified that man as Donald Lester at the trial. The summary also states he looked at another man in a blue suit "for a short period

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[6] This does not of necessity imply bad faith to the Government as argued by the Government in its Brief in Opposition to the grant of certiorari (P. 10).

[7] In its Brief in opposition to the granting of this writ, the Government states that the original notes had been destroyed (P. 10). It should be noted, however, that the record itself is completely without explanation as to the statement.

of time" and at the trial, he testified that man resembled Arnold Campbell.[8] It is also stated in the summary that he did not observe a third man in the bank although he testified at the trial that he did observe "a third man" in the bank (R. 143).

It has been shown, therefore, that there was error which pertained to all the petitioners. In its Brief in Opposition to the granting of Certiorari, the Government argues that "if there were error in the ruling it would be available only to petitioner Lester" and states that Staula's testimony only affected Lester. This is erroneous in several respects, as pointed out above, especially where the Courts have never seen the original statement. However, it must be pointed out that his statement might have contained matter which he *did not* testify to on direct examination but which was material to his entire testimony concerning a robbery and identifications. Clearly, omissions may very well supply impeachment material for defense counsel. A witness might well be asked why he neglected to say certain things on direct testimony as well as why he said something else on direct testimony.

As stated in *Rosenberg* v. *United States*, 360 U.S. 367, 371, "An appellate court should not confidently guess what defendant's attorney might have found useful for impeachment purposes in withheld documents to which the defense is entitled. . . . " The doctrine of harmless error as to any or all of the petitioners is inapplicable since, as stated above, the statement to which the defense was entitled has not been preserved in the record and the defense never has had whatever information it contained. In view of its destruction, there is no way to determine exactly what it contained.

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[8] Almost all other government witnesses identified the man in the blue suit as either being or resembling Alvin Campbell.

In summary, production of the Staula statement was not excused after a complete foundation under the statute had been laid on the ground that the prosecutor did not have it in his possession and where the only document in his possession was a summary which did not meet the statutory definition of a "statement."

II.

The Defense Motion to Strike for Failure to Produce the Original Statement—

Under the provisions of subsection (d) of the Act, if the United States elects not to comply with an order to produce, the court shall strike from the record the testimony of the witness. The statute does not specifically require a motion by the defendant. Apparently, the court should take such action *sua sponte*. In any event, the court did neither in this case. The question arises, therefore, as to what constitutes an election not to comply.

Petitioners submit that putting a statement out of the reach of a court order by destruction or any other means constitutes at the least the equivalent of an election not to comply. In the present cases, the judge made an order to produce and then asked the prosecutor to inquire of the F.B.I. agent as to the statement (R. 203). The prosecutors informed the judge they did not have the statement in their possession, whereupon the court announced he would give the matter further consideration. Upon resuming (R. 204), the court acted only on the basis of the agent's summary and no longer considered the issue of the original notes (R. 204-206).

Petitioners contend that under the provisions of subsection (d) and in the circumstances herein presented, it was obligatory upon the trial judge to strike the testimony of the witness Staula from the record.

III.

The F.B.I. Agent's Summary of the Staula Statement and the Common Law Demand for the Production Thereof—

Petitioners contend that upon the refusal of the judge to strike the Staula testimony from the record, he should have ordered the production of the F.B.I. agent's summary. There are several grounds for this contention.

In the concurring opinion of *Palermo*, Mr. Justice Brennan cites, for authority that a judge has discretion to order a statement outside the statute to be produced, an example of a person interrogated at length who says he has no knowledge of the incident and then later testifies in great detail as a government witness about the defendant's alleged criminal conduct. The agent's summary merely stating the witness had no knowledge would be admissible in the discretion of the court under the ~~view~~ expressed.

In the present cases, the trial judge said, "If he refuses (the common law demand), I have no power to order it" (R. 207). Obviously, if trial courts have certain discretionary powers outside the statute, then the judge's statement as to lack of power is erroneous.

The investigative report in this case contains matter quite similar to the example cited in the concurring opinion of *Palermo*:

> "Mr. Staula went on to state that he only observed the man standing in the center of the lobby for an instant and could give no further description of him because ~~he turned toward~~ the front of the bank and observed another man standing there holding a gun" (R. 212).

> "Mr. Staula stated he did not observe a third man in the bank . . ." (R. 213).

At the trial, Mr. Staula identified the defendant, Donald Lester, as the first man who held the gun on him (R. 146-147) and testified he did see a third man in the bank that day (R. 143). This presents almost exactly the situation which is presented as an example to show the necessity of allowing the trial judge to exercise discretion in certain instances which come outside the strict bounds of the statute.

Reverting to the petitioners' contention that the failure to produce a statement proven to have been in existence at one time and coming within the definitions of the statute cannot be without consequence, the F.B.I. agent's summary should have been ordered produced under the secondary evidence rule. See *United States* v. *Waidman*, 159 F. Supp. 747, 749, D.C.N.J. (1958). This is not entirely without some support within the statute itself.

The title to the "Jencks" statute and the legislative history all incorporate the word "report." The word "report" also appears in subsection (a) of the statute and then does not appear again within the body of the statute. The title to an act may be resorted to as an aid in its interpretation. *F.T.C.* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 388-389.

The judicial construction of a statute must be made in the light of the common law and any previous statutes on the subject. If a statute requires construction, and the "Jencks" statute does, then it should not be given an absolutely literal meaning especially in view of the fact that as a statute dealing with the trial of criminal cases, it should be liberally construed.[9]

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[9] Cf. *Yates* v. *United States*, 354 U.S. 298, 304-305. A statute should be liberally construed if it is humane in its scope. 50 Am. Jur., Statutes, 420, Sec. 396. See *F. T. C.* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 389; *Black* v. *Magnolia Liquor Co.*, 355 U.S. 24, 26.

"Accordingly, every statute which is properly the subject of judicial construction should receive such interpretation as will not conflict with general principles, but, to the contrary, which will make it harmonize with the pre-existing body of law."

50 Am. Jur., Statutes, 333, Sec. 340

The fact that a statute contains a partial codification of a particular rule or principle of the common law does not necessarily abrogate the remainder of the common law rule. See 50 Am. Jur., Statutes, 340, Sec. 346. Obviously, an interpretation of this Statute is necessary if the courts are to prevent the ending of all discovery of a witness' prior statements by a device perfected within the letter of the law. If the government itself creates a situation not covered by the statute, then it is necessary to revert to the common law for governing rules and principles.

In the present cases, after the original statement was lost or destroyed and after the judge refused to strike Staula's testimony, the situation was one coming within the purview of the *Jencks* case itself. That case was the latest decision dealing with the law of discovery of these statements prior to the enactment of the so-called "Jencks" statute. When counsel, therefore, made the common-law demand for the report by agent Toomey, it is the contention of the petitioners that it should have been produced under the principle of the "Jencks" case rather than excluded under the "Jencks" statute.

In view of the fact that there was no legislative intent to eliminate all discovery and the fact that the word "report" appears in the legislative history and the title and subsection (a) of the statute, there is a clear mandate that the common law be reverted to in a situation where the government has, as a practical matter, taken away the power

of the courts granted to it by the Statute. Take a situation where a trial judge demanded the original be produced, rather than as in the present cases where the trial judge was only interested in protecting the position of the government, it is inconceivable that such a judge would be entirely powerless to act if the original notes or statement had been destroyed.[10]

In the court below, the government argued that since such discovery is intended for impeachment purposes, it would be improper to allow a witness to be impeached by a statement not his own. However, it can also be argued that the investigative summary or report was based on the interview with the witness, and it is hard to imagine a situation where a government agent would prepare a report containing clear impeachment material (as in the present cases) which did not come from the witness in the first instance. Actually, the witness would have protection against anything contained in an agent's summary which the witness denies he stated. As stated in *Palermo*, "The statute governs the production of documents; it does not purport to affect or modify the rules of evidence regarding admissibility and use of statements once produced." The same is true of statements produced under common law rules.

The petitioners submit that it was not the intent of the Congress to insulate a witness who has already testified on direct examination from being impeached in order to help secure a conviction. As spelled out in the *Jencks* case, that would not satisfy the requirements of fair play and justice.

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[10] See footnote 2, *supra*, concerning the trial judge's comments about the Yates statement which was produced to the defense. Obviously, in view of what the Staula summary contained, the judge no longer felt the same way about the Staula summary as he did about the Yates summary. His positions in each are exactly opposite.

It was not necessary to protect Staula's identity after his direct testimony; no problems of national security were involved; and Staula was neither an informer-type witness nor a person with any knowledge about government informers or investigative procedures.[11] The conclusion is therefore inescapable that there was utterly no reason, after his direct testimony, for not ordering the report to be produced (after it was stated that the originals were not available).

On the other hand, if this Honorable Court should decide there cannot any longer be any common law remaining and that all situations must come within the statute, then the petitioners respectfully refer this Court back to Part II of this Argument section concerning the Motion to Strike. It may perhaps be the better rule in any event to strike the testimony since a summary might inadvertently omit some phrase, sentence, or thought which would have been valuable to the defense either alone or in conjunction with other matters. The statute does specifically direct that the defense obtain any statement defined within the statute after certain conditions are met, and it was, after all, the F.B.I. that wanted the protection of this statute after the *Jencks* decision. Bearing all that in mind, it should be incumbent upon the government to preserve all original statements for possible use at a trial subject, of course, to the statute. In the alternative, the government should face the loss of the testimony of a witness or a mistrial or both.

It is submitted that the foregoing amply shows that the production of the original Staula statement was not excused merely because the government did not have it in its possession and further it shows that the non-production is

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[11] See *Roviaro* v. *United States*, 353 U.S. 53, 59-61.

not without consequence. The answer to the "Question Presented" is therefore supplied in the negative. Any other solution would serve only to defeat the purposes of the statute.

Conclusion

It is respectfully submitted that the judgments below should be reversed.

Respectfully submitted,

LAWRENCE F. O'DONNELL
One State Street
Boston, Massachusetts

MELVIN S. LOUISON
LEONARD LOUISON
8 Taunton Green
Taunton, Massachusetts

Counsel for Petitioners

August 1960

APPENDIX

TITLE 18 U.S. CODE, SECTION 3500

"Demands for Production of Statements and Reports of Witnesses

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement

shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

"(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement,' as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means—

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."